

**Brian R. Smith**

Attorney at Law  
Amarillo Building  
301 S. Polk, Suite 675  
Amarillo, Texas 79101  
(806) 373-3993 / Fax 374-3980  
email: [brs@suddenlinkmail.com](mailto:brs@suddenlinkmail.com)

Barbara Hook, Paralegal

**Mailing Address:**  
P. O. Box 9134  
Amarillo, TX 79105-9134

January 29, 2008

Ms. LaDonna Castenuela  
Chief Clerk, TCEQ  
MC 405  
P. O. Box 43087  
Austin, TX 78711-3087

**VIA FACSIMILE: 1-512-475-4994**

Re: SOAH DOCKET NO. 582-08-0523  
TCEQ DOCKET NO. 2007-0768-AIR-E

Dear Ms. Castenuela:

Enclosed please find an original and one copy of Respondent's Motion to Vacate Default Judgment and Reopen Record, which I would ask that you file with the papers of this cause. I would also ask that you return a file-marked copy to me in the enclosed self-addressed and stamped envelope.

Thank you for your attention to this matter.

Sincerely,



Brian R. Smith

xc: Ms. Kathleen C. Decker  
Texas Commission on Environmental Quality  
Litigation Division  
MC-175 P. O. Box 13087  
Austin, TX 78711-3087

**VIA FACSIMILE (512) 239-3434**

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JAN 31 PM 2:54  
CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY,  
Petitioner

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BEFORE THE STATE OFFICE

VS.

OF

ADVANTAGE ASPHALT PRODUCTS, LTD.

ADMINISTRATIVE HEARINGS

**MOTION TO VACATE DEFAULT JUDGMENT AND REOPEN RECORD**

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now, ADVANTAGE ASPHALT PRODUCTS, LTD., Respondent, and files this Motion for to Vacate Default Judgment and Reopen Record as follows:

I.

Respondent was notified by facsimile transmission on January 24, 2008 of a Proposal for Decision and Default in the above-referenced matter. Respondent had previously entered an appearance, pro se, and requested a hearing. Respondent does not deny receiving the notice of the preliminary hearing on or about October 26, 2007; however, Respondent is involved in another enforcement matter under SOAH Docket No. 582-04-8905; TCEQ Docket No. 2003-1310-AIR-E. That case was also set for hearing on December 6, 2007. Prior to the December 6, 2007 hearing in SOAH Docket No. 582-04-8905, one of Respondent's key witnesses was involved in an automobile accident and on November 28, 2007 a Motion for Continuance was filed in SOAH Docket No. 582-04-8905.

Respondent, ADVANTAGE ASPHALT, through its representatives mistakenly believed that the notice of preliminary hearing scheduled for December 6, 2007 was SOAH Docket No. 582-04-8905 and not SOAH Docket No. 582-08-0523. Likewise, Respondent operated under the mistaken belief that when the Motion for Continuance was granted in SOAH Docket No. 582-04-8905 that the hearing for December 6, 2007 had been vacated.

At the time of the hearing and subsequent default, Respondent had not engaged legal counsel to represent them in this matter.

Further, Petitioner had requested certain information from Respondent, to which Respondent had complied in an effort to compromise and settle the matter prior to hearing. Respondent believed then that

prior to a final hearing there would be an opportunity to have a mediation conference in order to resolve the matter.

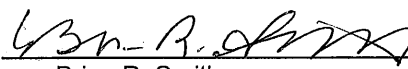
Respondent would show as evidenced by the affidavits attached hereto that the failure to appear at the hearing was the result of an accident and mistake rather than Respondent's intentional or conscious indifference.

WHEREFORE, Respondent prays that the foregoing Motion to Vacate Default Judgment and Reopen Record be granted and that Respondent be allowed to proceed with their defense or in the alternative that the Motion be set for hearing before this Court.

Respectfully submitted,

BRIAN R. SMITH  
Attorney at Law  
P. O. Box 9134  
Amarillo, Texas 79105-9134  
Phone (806) 373-3993  
Fax (806) 374-3980

ATTORNEYS FOR RESPONDENT

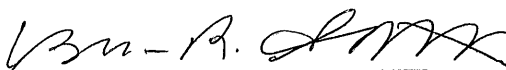
By:   
Brian R. Smith  
State Bar No. 18542400

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing was forwarded via facsimile transmission, on this 29th day of January, 2008, as follows:

Ms. Kathleen C. Decker  
Texas Commission on Environmental Quality  
Litigation Division  
MC-175 P. O. Box 13087  
Austin, TX 78711-3087

**VIA FACSIMILE TRANSMISSION (512) 239-3434**

  
Brian R. Smith

## AFFIDAVIT

THE STATE OF TEXAS   §  
                                  §  
COUNTY OF POTTER   §

BEFORE ME, the undersigned authority, on this day personally appeared SCOTTY KNUTSON, who, being by me first duly sworn, upon her oath deposes and says:

"My name is Scotty Knutson, I am over the age of eighteen (18) years, duly qualified to make this Affidavit, and have personal knowledge of the contents hereof.

"I am a partner in Advantage Asphalt, Ltd. and have full authority to make this affidavit. I received notice of a violation from the TCEQ on or about July 23, 2007. Upon receiving the EDPRP I forwarded the information to Jack Benton, Benton & Associates, who contacted the TCEQ on my behalf and assisted me in filing a pro se answer and requesting that the matter be set for hearing.

"At the same time we had another proceeding under SOAH Docket No. 582-04-8905. Advantage Asphalt had retained the services of Brian R. Smith, Attorney at Law, to represent them in this matter. We had received notice in SOAH Docket No. 582-04-8905 that the case was set for hearing on December 6, 2007, in front of the Honorable Penny Wilcov. On or about November 13, 2007, Mr. Benton was involved in a severe automobile collision, which left him unable to attend to the affairs of his business. As a result Mr. Smith, on behalf of Advantage Asphalt filed a Motion for Continuance in SOAH Docket No. 582-04-8905, which was granted by the Court.

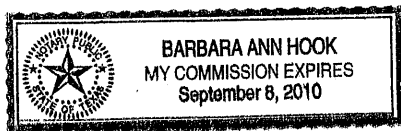
"The Notice of hearing forwarded from the Court on this case was received by my office; however, since the hearing was scheduled for December 6, 2007, we mistakenly thought that the hearing was for SOAH Docket No. 582-04-8905 and had already been calendared for that date. When Mr. Benton was involved in the collision and the Motion for Continuance granted, we mistakenly believed that the matter pending before this Court had been continued.

"Prior to receiving the notice of hearing, Mr. Benton, on our behalf had engaged in settlement talks with TCEQ in hopes of resolving the matter short of hearing. We had provided information to the TCEQ with the understanding that it would be reviewed and we would be discussing the matter with hopes of a possible

settlement conference. When the hearing took place on December 6, 2007, I was still of the understanding that the matter was being reviewed by TCEQ.

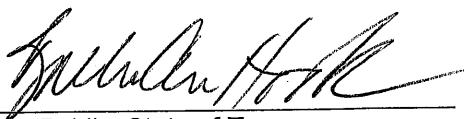
"The failure to appear at the hearing scheduled for December 6, 2007 was due to accident or mistake and not conscious indifference. Advantage Asphalt has diligently participated in all other matters before the TCEQ and SOAH and continues to do so.

"Further Affiant sayeth not."



  
SCOTTY KNUTSON

SWORN TO and SUBSCRIBED BEFORE ME by the said SCOTTY KNUTSON on this the 29<sup>th</sup> day of January, 2008, to certify which WITNESS MY HAND AND SEAL OF OFFICE.

  
Notary Public, State of Texas